



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

May 10, 1961

Hon. Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin, Texas

Opinion No. WW-1052

Re: Whether the Transwestern Pipeline Company may file a franchise tax return as a public utility before commencing business as such, or should they be liable for franchise tax as an "ordinary corporation" and kindred questions.

Dear Mr. Calvert:

You have requested the opinion of this department concerning the franchise tax liability of Transwestern Pipeline Company under Article 12.01, Title 122A, Revised Civil Statutes of Texas, based upon the following factual situation.

Transwestern Pipeline Company, a Delaware corporation, obtained a certificate of authority from the Secretary of State on October 29, 1957, to do business in Texas for the following purposes:

"(a) To buy, sell, transport, store and furnish gas for light, heat, power and other purposes; to buy, exchange, lay down, construct, contract for, lease, and in any and all other ways acquire, take, hold and own pipelines, tubes, tanks, storage facilities, compressor stations, pump stations, connections, fixtures and such telegraph and telephone lines, machinery, apparatus, devices and arrangements as may be useful or necessary to operate such pipes and pipelines between different points, and to improve, maintain and operate the same, and to sell, mortgage, lease or otherwise encumber or dispose of the same;

"(b) To mine for, produce, buy, acquire, use, sell and distribute natural gas for light, heat, power and other purposes, and also to produce, acquire, use, sell and distribute the by-products and residual products therefrom, and to construct or in any manner acquire, maintain, operate, encumber, sell or in any manner dispose of works therefor, and any and all

necessary equipment and appurtenances necessary or incident to such operations and business;

"(c) To establish and maintain an oil business with authority to contract for the lease and purchase of the right to prospect for, develop and use coal and other minerals, petroleum and gas; also the right to erect, build and own all necessary oil tanks, cars and pipes necessary for the operation of the business of the same; provided, however, that nothing hereinabove contained shall authorize the Company to engage directly in the oil pipe line business in the State of Texas."

It began transporting gas through its pipelines in the State of Texas on July 1, 1960. Transwestern Pipeline Company rendered its return on October 29, 1958, in which it paid the minimum tax, no business of any nature having been transacted by the company under any of its purpose clauses during the taxable period.

However, the company's return filed for the year 1960 reveals that the company received the sum of \$3,750.00 from gross receipts from its entire business, inclusive of the \$3,750.00, including interest on obligations of the United States, in the amount of \$14,453.00, and proceeds from the sale of pipe (Illinois), in the sum of \$288,305.00, or a total of gross receipts from all business done, in the sum of \$306,518.00. Calculating its return on 1.22%, which is the percentage relationship which the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, the corporation paid a basic franchise tax in the sum of \$1,104.75 as a public utility corporation in accordance with the provisions of Article 12.01(3), which is in part as follows:

"(3) Except as provided in preceding subsection (2), all public utility corporations, which shall include any such corporation engaged solely in the business of a public utility as defined by the laws of Texas whose rates or services are regulated, or subject to a regulation in whole or in part, by law, shall pay a franchise tax as provided in this Article which shall be based on whichever of the following shall yield the greatest tax:

(a) Two Dollars and Twenty-five Cents (\$2.25) per One Thousand Dollars (\$1,000) or fractional part thereof applied to that portion of the stated capital, surplus and undivided profits, allocable to Texas in accordance with Article 12.02 of this Chapter.

(b) Two Dollars and Twenty-five Cents (\$2.25) per One Thousand Dollars (\$1,000) or fractional part thereof applied to the assessed value for County ad valorem tax purposes of the property owned by the corporation in this State.

(c) Twenty-five Dollars (\$25.00)."

Your first question is as follows:

"May the Transwestern Pipeline Company file a franchise tax return as a 'public utility' before they actually commence business as a public utility, or should they be liable for franchise tax as an 'ordinary corporation?'"

There is no question that Transwestern Pipeline Company is a public utility corporation as defined by Article 6053, Revised Civil Statutes, although it is not a corporation authorized to engage solely in the business of a public utility since, under the third purpose clause contained in its certificate of authority, supra, it may establish and maintain an oil business which is not the business of a public utility corporation as defined by the laws of Texas.

The franchise tax levied under Chapter 12, Title 122A, R.C.S., is a charge made by the State of Texas for the privilege granted it of doing business in Texas. Houston Oil Co. of Texas v. Lawson, 175 S.W.2d 716 (Civ.App. 1943, error ref.). If the company does no business it would pay the franchise tax as provided by Article 12.01(3)(c), or as provided by Article 12.01(3)(b) if it yields a greater tax, which was done by the corporation in its returns for 1958 and 1959.

Since its return for 1960 shows receipts from business done in Texas, which were not received from business done under the third purpose clause above referred to, but from capital investments incident to its public utility business, such receipts are allocable to the company's business done as a public utility corporation, even though it did not actually begin transporting gas through its pipelines as a public utility corporation in the State of Texas until July 1, 1960. Therefore, Transwestern Pipeline Company had the right to file its franchise tax return as a public utility before it began transporting gas through its pipelines in the State of Texas on July 1, 1960.

Your second question is as follows:

"What is the determining factor that classifies a corporation as being engaged 'partly in the business

of a public utility as defined in Subsection (3) of this Article and partly in business embraced in Subsection (1) of the Article' for franchise tax purposes?"

The company's records do not show that it has been engaged at any time in the oil business as provided in the third purpose clause above referred to, but if and when it engages in such business, then its receipts therefrom should be allocated as provided by Article 12.01(4), Title 122A, since it will then be engaged partly in the business of a public utility as defined in subsection (3), and partly in business embraced in subsection (1) of Article 12.01.

Your third question, being based upon a hypothetical situation which is not applicable to the subject corporation, no answer thereto is deemed necessary in view of the long established custom of this office not to give opinions in answer to hypothetical questions.


SUMMARY

Transwestern Pipeline Company, being a public utility corporation as defined by Article 6053, R.C.S., has the right to file its franchise tax return as a public utility corporation under the provisions of Article 12.01(3), Title 122A, R.C.S. The factor which classifies a corporation as being partly in the business of a public utility as defined in Article 12.01(3), and partly in business embraced in Article 12.01(1), under the provisions of Article 12.01(4), is determined by the actual receipts from its business done under Article 12.01(1), Title 122A.

Very truly yours,

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By


C. K. Richards
Assistant

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APPROVED:

OPINION COMMITTEE

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REVIEWED FOR THE ATTORNEY GENERAL

BY: Morgan Nesbitt